NO. 82-531

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MORGAN WALTON PROPERTIES, INC., et al.,
Petitioners,

versus

INTERNATIONAL CITY BANK AND TRUST COMPANY, etc., and FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
(Former Fifth Circuit Case)

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED FOR REVIEW

1. Whether summary judgment under Rule 56, Federal Rules of Civil Procedure, was properly granted, holding that promissory notes were payable on demand, where the promissory notes were "payable on demand or two years after date," but a marginal notation on the promissory notes contained due dates two years after execution.

2. Whether promissory notes made in favor of a bank, later succeeded by the Federal Deposit Insurance Corporation, payable "demand or two years after date," but showing due dates of two years after execution, are demand notes or notes payable two years after execution.

PARTIES

This petition seeks review of two judgments of the United States Court of Appeals for the Fifth Circuit which were virtually identical or so closely related that a single petition for writ of certiorari is appropriate for both cases. Rule 19.4, Supreme Court Rules. The petitioners in the first case (Fifth Circuit Case No. 77-3255) are Morgan Walton Properties, Inc. and Florida Universal Financial Corporation, co-partners doing business as Grayton Dunes Properties, Morgan Walton Properties, Inc., Florida Universal Financial Corporation, Joseph F. Morgan, Johnnie Mae Morgan, Jerome W. Burkett and Joe A. Schaeffer, Jr. The petitioners in the second case (Fifth Circuit Case No. 77-3256) are Joseph F. Morgan and Johnnie Mae Morgan, husband and wife. The respondents in each case are International City Bank and Trust Company and Federal Deposit Insurance Corporation. International City Bank and Trust Company was held by ICB Corp.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MORGAN WALTON PROPERTIES, INC., et al.,
Petitioners,

v.

INTERNATIONAL CITY BANK AND TRUST COMPANY, etc., and FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondents.

PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

The petitioners, Morgan Walton Properties, Inc., et al., respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 10, 1982.

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* Former Fifth Circuit Case, Section 9(1) of Public Law 96-452, October 14, 1980.

OPINIONS BELOW

The opinions of the United States Court of Appeal, Fifth Circuit, are officially reported at 675 F.2d. 666 (App. A-1–A-8) and 675 F.2d. 669 (App. A-13). 1/ The memorandum decision and order of the United States District Court, Northern District of Florida, is unreported (App. A-18–A-24). Opinions collateral to this case, but unnecessary to the question presented for review, are reported at 612 F.2d. 227 and 404 So.2d 1059.

JURISDICTION

The judgments of the United States Court of Appeals were entered on May 10, 1982 and timely petitions for rehearing and rehearing *en banc* were denied on June 28, 1982 (App. A-9–A-10, A-14–A-15). This petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

Rule 56(a) - (c), Federal Rules of Civil Procedure, provides as follows:

> Rule 56. Summary Judgement
>
> (a) *For Claimant*. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20

1/ References to the record in the District Court are by designation "R" and to the appendix to this petition by designation "App.".

days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

An action was commenced in the United States District Court for the Northern District of Florida by respondent

International City Bank and Trust Company, a Louisiana banking corporation. The Federal Deposit Insurance Corporation was joined as a plaintiff in the District Court upon its appointment as receiver and transferee of the ownership of the assets of the International City Bank and Trust Company (R 1938-1939).

On December 27, 1974, the bank filed a complaint, based on diversity of citizenship, for foreclosure of certain real property located on the Gulf of Mexico in Walton County, Florida (R 1-56). The complaint alleged that the corporate petitioners herein executed and delivered in New Orleans, Louisiana, two promissory notes payable "demand or two years after date," one on December 29, 1973, in the principal sum of $4,550,000.00 and the other on April 25, 1974, in the principal sum of $2,143,000.00 (R 3-4). The individual petitioners were joined as guarantors (R 5-6). Petitioners filed an answer, affirmative defenses and counterclaims with several amendments thereto during the course of the litigation. In their initial answer petitioners admitted the execution and delivery of the promissory notes, but denied that the notes were "demand" notes, that any demand had been made or that they were in default on any obligations owed to the bank (R 75-76). The other defenses and counterclaims are not material to this petition.

Another promissory note was executed by petitioners Joseph F. Morgan and Johnnie Mae Morgan in the principal sum of $335,000.00 on January 11, 1974, payable "demand or two years after date."

Each of the three notes contained the following language "demand or two years after date, we . . . promise to pay . . . ." (R 8, 47). Typed in a space provided in the margin of the printed form notes, however, following the

printed word "DUE," were the dates "December 29, 1975," "April 25, 1976," and "1-11-76," respectively, representing two years from the date of execution of each note. One of the petitioners, Jerome W. Burkett, questioned the use of the word "demand" on the promissory notes but was assured by the bank that the use of this term was a mere formality (R 671). Relative to the bank's intent, its Vice President, John R. Sitton, Jr., who handled all of the transactions, acknowledged in an affidavit that the language "demand or two years" was used because it was a custom of the bank to place the word "demand" on its promissory notes, but that he had previously been advised by the bank's attorneys that a note containing that specific language would not be construed by a court to be a demand instrument (R 925). Mr. Sitton further testified on deposition that no payment of principal was expected before the end of two years from date of execution and that the loan was presented to the bank board for approval in that fashion (R 924). At the closing of each loan prepaid interest for two years was withheld (R 924-925).

Plaintiffs and defendants both moved for summary judgment in the District Court on the issue of whether the notes sued upon were "demand" notes or notes payable two years from the date of their execution. The District Court denied petitioners' motion for summary judgment and granted that of respondents, finding that the notes sued upon were demand notes, that there was no ambiguity in the notes to justify introduction of parol evidence as to their interpretation and that no demand was required before filing suit (App. A-18-24). The Court of Appeals agreed with each of the District Court's conclusions and held that summary judgment on the issue of whether the notes were payable on demand or two years after date of execution

was proper (App. A-1–A-7).

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Jurisdiction of this cause in the District Court was based upon diversity of citizenship and the amount involved which was in excess of $10,000.00, exclusive of interest and costs. 28 U.S.C. 1332.

REASONS FOR GRANTING THE WRIT

This Court has long recognized that the purpose of the summary judgment procedure in contract actions is to prevent the use of frivolous defenses to cause vexatious delays in enforcement of the contract. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315 (1902). This Court also recognized in that case that summary judgment procedure should not be used to dispense with significant defenses and to deny the right of jury trial in an appropriate case.

Summary judgment procedure in its modern form requires that there be a complete absence of genuine issues of material fact and that the moving party be entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure. The purpose of the Rule is not to deny litigants the right to trial by jury where there are appropriate issues to be tried. *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962); *Sartor v. Arkansas National Gas Corp.*, 321 U.S. 620 (1944). We respectfully submit that the Court of Appeals, in affirming the summary judgment of the District Court, has interpreted Rule 56 in such a manner as to conflict with the applicable decisions of this Court interpreting the Rule and the decisions of other Court of Appeals. Rule 17, Supreme Court Rules.

In ruling on the motion for summary judgment with regard to whether the promissory notes were "demand" notes, the District Court was confronted with promissory notes "payable on demand or two years after date." Due dates were contained in the margin of the notes, however, which were clearly two years after their execution. Despite this obvious conflict on the face of the instrument, the District Court and Court of Appeals both concluded that the notes were clear and unambiguous, precluding the consideration of parol evidence as to the interpretation of the parties. Such a finding circumvents the true purpose of summary judgment procedure. While certainly summary judgment procedure is appropriate if the provisions of a written contract are unambiguous, such procedure is totally inappropriate unless the contract is "wholly unambiguous" and where only one fairly reasonable interpretation is indicated. *Heyman v. Commerce and Industry Insurance Co.*, 524 F.2d 1317 (2d Cir. 1975). The appropriate test to follow for summary judgment in contract cases was stated succinctly by the court in *Davis v. Chevy Chase Financial Ltd.*, 667 F.2d 160, 169-170 (D. C. Cir. 1981):

> However the test for determining the clarity of contract terms is formulated, the core notion is clear: summary judgment on a contract is appropriate only when the relevant provisions are so straightforward that they can be read in but one way.

Where the intent of the parties is in fact unclear, parol evidence is admissable and relevant as an aid in construing the contract. *Davis v. Chevy Chase Financial Ltd., supra.*

In holding that the notes were clear and unambiguous, eliminating the consideration of parol evidence and support-

ing the summary judgment in favor of the bank, the court below relied upon a Louisiana state court decision, *Gulf States Finance Corp. v. Airline Auto Sales, Inc.*, 248 La. 591, 181 So.2d 36 (1965) and a decision of the Ninth Circuit Court of Appeals, *Bank of Nevada v. United States*, 251 F.2d 820 (9th Cir. 1957), *cert. denied*, 356 U.S. 938 (1958) (erroneously cited by the Court of Appeals as a Fifth Circuit case). The reliance by the Court below on these two cases contributed to its misinterpretation of the applicability of summary judgment to this case.

In *Gulf States Finance Corp. supra*, plaintiff brought suit on 50 demand notes given under an oral "floor planning agreement." Those notes were clearly demand notes in that there was no "qualifying language" in the notes such as the due dates contained in the marginal notations of the notes at bar. Defendants denied that formal demand for payment of the notes had been made before institution of suit. (In the present case it was admitted that no formal demand was made prior to bringing suit). Plaintiff's president supported the allegations of demand with an affidavit and a copy of a certified letter of notice of demand. The trial court entered summary judgment in favor of plaintiff. The Supreme Court of Louisiana reversed, holding (1) that defendants' specific denial of plaintiff's allegation that formal demand for payment of the notes had been made before suit created a genuine issue of material fact precluding summary judgment and (2) that parol evidence was proper to show a contemporaneous oral agreement by which the notes were not due until a later date.

The Louisiana Supreme Court noted that as between the parties to an instrument, a "grave injustice, resulting in irreparable injury to defendants" as would "perpetrate a fraud upon them" would occur if the court were not to

look outside the notes to the obligations under an oral agreement which induced them to execute the notes. *Gulf States Finance Corp., supra,* 181 So.2d 40. There is equally present at bar a set of circumstances whereby the conclusion is compelled that an issue of fact remained as to whether the notes were due on demand or within two years from the date of their execution.

The court below referred to *Bank of Nevada v. United States, supra,* as the most closely analogous case to the facts at bar. The court there pointed out, however, that a true demand note is payable immediately upon demand so that suit can be maintained at any time after delivery of the note with no other demand other than suit. The court went on to point out that if "there is something on the paper" to show a contrary intention of the parties, that rule does not apply. Clearly the marginal notation on each of the promissory notes sued upon in this case demonstrated "something on the paper" which created a genuine issue as to whether the notes were payable on demand or in two years.

Not considered below were a number of cases from other jurisdiction which have held that promissory notes containing language similar to that contained in the notes at bar are *not* demand notes and the holder is not entitled to bring an action thereon until the stated due date. E. g. *Whittier v. First National Bank,* 73 Colo. 153, 214 P. 536 (1923); *Brown v. Maguire's Real Estate Agency,* 101 S.W.2d 41 (Mo. 1937), *reversed on other grounds,* 121 S.W.2d 754; *Maffett v. Emmons,* 52 N.M. 115, 192 P.2d 557 (1948). Other courts have held that the marginal notation controls as to the due date of the note. E.g. *Baucom v. Friend,* 52 A.2d 123 (D.C. App. 1947); *Banking Commission v. Townsend,* 243 Wis. 329, 10 N.W.2d 110 (1943); *Nylander v. Nylander,*

268 N.W. 7 (Iowa 1936); *In re Feldman's Estate*, 387 Ill, 568, 56 N.E.2d 405 (1944).

Thus, it could hardly be said that the promissory notes were "wholly unambiguous" and that summary judgment was the appropriate procedure to resolve this conflict. Rather, parol evidence should have been considered by the District Court.

The parol evidence concerning the intention of the parties to the notes at the very least would have prevented the entry of summary judgment against the petitioners. That evidence includes the following facts: (1) The Vice President of the bank stated that no payment of principal was expected for two years. (2) The petitioners questioned the use of the word "demand" before execution but were assured by the Vice President of the bank this was a mere formality. (3) The Vice President of the bank stated that the language "demand or a certain number of years" was used as a custom of the bank but without legal effect. (4) The loans were presented to the bank board as two years loans. (5) Interest was prepaid at the closing for each note for a full two years. Concerning the latter fact, a number of courts have held that the prepayment of interest for a certain term is deemed to extend the due date on a note through the end of the period for which interest has been prepaid. *Rogers v. Public Service Employees Credit Union*, 112 S.W.2d 258 (Tex. App. 1937); *Walley v. Desert National Bank*, 14 Utah 305, 47 P. 147 (1896); *Ardmore State Bank v. Lee*, 61 Okla. 169, 159 P. 903 (1916).

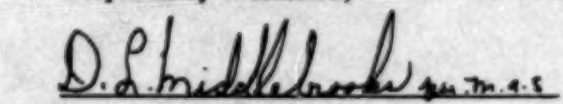
The United States Court of Appeals below should have reviewed the District Court's summary judgment under the principle that the respondents had the burden of establishing

"that there [was] not the slightest doubt as to the facts" involved. *Insurance Company of No. America v. Bosworth Construction Co.*, 469 F. 2d 1266, 1268 (5th Cir. 1972). In affirming the summary judgment, the court below violated the letter of Rule 56, as well as its spirit, justifying the grant of certiorari to review the judgment below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,



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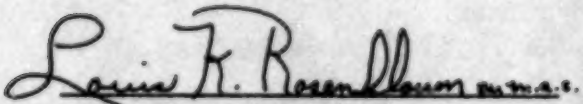

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FORMER FIFTH

INTERN. CITY BANK, ETC. v. MORGAN WALTON PROPERTIES

INTERNATIONAL CITY BANK AND TRUST COMPANY, ETC., et al.,
Plaintiffs-Appellees,

v.

MORGAN WALTON PROPERTIES, INC., et al.,
Defendants-Appellants.

No. 77-3255.

United States Court of Appeals, Fifth Circuit.*

May 10, 1982.

Makers appealed from judgments entered by the United States District Court for the Northern District of Florida, Winston E. Arnow, Chief Judge, in mortgage foreclosure proceedings. The Court of Appeals held that: (1) notes "payable on demand or two years after date" were payable on demand and, in absence of demand, two years after execution; (2) formal demand was not necessary prior to commencing suit; (3) evidence was sufficient to support determination that there was no issue of material fact regarding existence of seven-year joint venture or financing contract; and (4) denial of makers' motion for new trial, which was premised upon allegedly prejudicial statements

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

made by bank's counsel in closing argument, was not abuse of discretion.

Affirmed.

See also 612 F.2d 227; 404 So.2d 1059.

1. Bills and Notes key 129(1, 3)

Promissory notes "payable on demand or two years after date" were payable on demand and, in absence of a demand, two years after execution.

2. Bills and Notes key 116

Promissory notes must be viewed as a whole.

3. Evidence key 448

Where promissory notes were unambiguous, parol evidence was not admissible to ascertain intention of parties.

4. Bills and Notes key 444

Formal demand for payment on promissory notes was not necessary prior to commencing action on notes since filing of lawsuits constitutes a demand.

5. Bills and Notes key 422(1)

Provision in promissory notes by which makers waived "presentment for payment, demand, protest, and notice of protest and non-payment" was binding.

6. Bills and Notes key 394, 398

Even if demand were required prior to commencement of suit on promissory notes, formal demand would merely

permit maker to set up certain defenses as to costs and damages and did not preclude recovery on notes.

7. Federal Civil Procedure key 2546

Evidence was sufficient to support determination that there was no issue of material fact regarding existence of seven-year joint venture for financing contract between bank and makers, who contended that bank's suit on promissory notes only one year after their execution breached an oral agreement to such effect, notwithstanding inconclusive statements of bank's president and chairman of the board, where promissory notes in issue were demand notes, loan agreements provided principal could become payable prior to maturity date stated and funds remaining in escrow would be refunded to makers, and bank was not party to written contract on which makers relied.

8. Corporations key 1.5(2)

Corporations are treated as separate legal entities notwithstanding fact that they have common shareholders and officers, or that one corporation owns stock in the other.

9. Corporations key 1.6(2)

In absence of legal grounds for disregarding separate existence of two corporations, contract of one is not contract of other.

10. Federal Courts key 825

Absent abuse of discretion, trial judge's decision to deny motion for new trial will not be disturbed.

11. Federal Civil Procedure key 2335

In bank's suit against makers on promissory notes, denial of makers' motion for new trial was not abuse of discretion where allegedly prejudicial closing statements of bank's counsel, asserting that one witness had been paid for his trial testimony and that another witness' testimony was given in return for political favors, were not harmful to makers within meaning of harmless error rule. Fed.Rules Civ.Proc. Rule 61, 28 U.S.C.A.

Appeal from the United States District Court for the Northern District of Florida.

Before CHARLES CLARK, RONEY and HENDERSON, Circuit Judges.

PER CURIAM:

In this diversity mortgage foreclosure action, four issues were raised on appeal by the defendants against whom judgment was taken on the notes and mortgages involved. One of those issues, whether Florida or Louisiana usury law applies, has been resolved by the answer to a question certified by this Court to the Florida Supreme Court. *International City Bank & Trust Co. v. Morgan Walton Properties, Inc.*, 612 F.2d 227, 229 (5th Cir. 1980). That court held that Louisiana law applies so that the district court was correct in ruling Florida usury law is not a defense to a suit on the notes. The issue needs no discussion here. *Morgan Walton Properties, Inc. v. International City Bank & Trust Co.*, 404 So.2d 1059 (Fla. 1981).

The other three issues concern the district court's holding that (1) the notes were payable on demand; (2) there was no enforceable contract under which the defendants were to receive financing for seven years; and (3) comments of plaintiff's counsel made during final oral argument did not prejudice the jury's verdict. Deciding that the district court was correct on all rulings, we affirm.

"Demand or Two Years After Date"

Seeking to develop Walton County property into a seaside residential complex, defendants executed and delivered to International City in New Orleans, Louisiana, two promissory notes "payable on demand or two years after date." The first note was executed December 29, 1973 for $4,550,000, the second on April 25, 1974 for $2,143,000. The notes were payable in New Orleans. No formal demand on the notes was made by International City before institution of this action on December 27, 1974. Due dates of December 29, 1975 and April 25, 1976 were typed in the margins of the notes, respectively.

Defendants claim the notes are two-year notes, making plaintiff's action approximately one-year premature.

[1] On partial summary judgment the district court held the language "demand or two years after date," coupled with marginal notations of due dates, is clear and unambiguous, making it inappropriate to take parol evidence to resolve an ambiguity asserted by defendants. We agree with the conclusion of the district court that the notes were payable on demand, and in the absence of a demand, two years after execution.

[2] Such notes must be viewed as a whole. *Royal St.*

Louis, Inc. v. United States, 578 F.2d 1017, 1018 (5th Cir. 1978). The parties have not cited nor have we found decisions involving the precise language at hand reaching a contrary result. The most closely analogous case, *Bank of Nevada v. United States*, 251 F.2d 820 (5th Cir. 1958), is supportive of the district court's construction.

[3] Because the notes are unambiguous, parol evidence is not admissible to ascertain the intention of the parties. *Gulf States Finance Corp. v. Airline Auto Sales, Inc.*, 248 La. 591, 181 So.2d 36 (1965). The notes were payable on demand and plaintiff's suit was not premature. *See Bank of Nevada*, 251 F.2d at 827.

[4-6] Neither is it significant that plaintiff failed to make formal demand prior to commencing this suit. Because the filing of the lawsuit constitutes a demand, a formal demand was not necessary. 10 C.J.S. *Bills and Notes* §345 (b). Moreover, in both notes defendants waived "presentment for payment, demand, protest, and notice of protest and non-payment." This provision is binding. *Frank-Taylor-Kendrick Co. v. Voissement*, 142 La. 973, 77 So. 895 (1918). The purpose of demand prior to suit, to give the maker of the note opportunity to pay and avoid litigation expenses, is of no practical consequence where, as here, the maker chooses to defend the action. *See* 10 C.J.S. *Bills and Notes* §345(b). Even if a demand were required before suit, a formal demand merely permits the maker to set up certain defenses as to costs and damages and does not preclude recovery on the notes. *Id.* §345(c).

Seven-Year Development Contract

Defendants contend plaintiff's suit on the notes only one

year after their execution breached an oral agreement under which plaintiff was to finance defendants' Walton County project for seven years. Defendants rely on language in the notes, the loan agreements, a contract, and certain statements made by plaintiff's president and chairman of the board. The district court decided this issue in favor of plaintiff on partial summary judgment.

[7] Careful review of the evidence in the light most favorable to defendants, *Marshall v. Victoria Transportation Co., Inc.*, 603 F.2d 1122 (5th Cir. 1979), reveals no issue of material fact regarding the existence of a seven-year joint venture or financing contract. The promissory notes in issue are demand notes. Plaintiff could demand payment any time after execution, and was not required to wait two years, seven years or any other fixed time before doing so. This fact is reflected in the loan agreements, which provide the principal could become payable prior to the maturity date stated and funds remaining in escrow would be refunded to defendants.

[8, 9] Plaintiff was not a party to the written contract on which it relies. Louisiana recognizes the general rule that corporations are treated as separate legal entities notwithstanding the fact that they have common shareholders and officers, or that one corporation owns stock in the other. *Adams v. Associates Corp. of North America*, 390 So.2d 539, 542 (La. App. 1980). In the absence of legal grounds for disregarding the separate existence of the two corporations, the contract of one is not the contract of the other.

Viewed in the proper legal and factual context, the inconclusive statements of plaintiff's president and chairman of the board do not establish a material fact issue as to the existence of a seven-year joint venture or financing

contract.

Since we conclude the district court was correct in deciding that no genuine issue of material fact exists on this point, and that there was no joint venture or seven-year financing agreement between the parties to this lawsuit, plaintiff's claim that proof of such an oral contract is barred by the statute of frauds under Louisiana law need not be considered.

Final Argument of Plaintiff's Counsel

During final argument plaintiff's counsel commented on the testimony of two defense witnesses. As to one, defendants contend they were prejudiced by the assertion of plaintiff's counsel that the witness had been paid for his trial testimony by the president of defendant Morgan Walton Properties, Inc. Finding counsel's statement a fair inference and comment on the evidence, defendants' objection was overruled by the trial court. As to the other witness, defendants claim they were prejudiced by counsel's suggesting the testimony was given in return for political favors. No objection was made to the statements concerning this latter witness. Defendants filed a motion for new trial on the ground counsel's arguments had prejudiced the jury.

[10, 11] Absent an abuse of discretion, the trial judge's decision to deny a motion for new trial will not be disturbed. *Young v. Illinois Central Gulf Railroad Co.*, 618 F.2d 332, 336 (5th Cir. 1980). Careful review of the statements claimed prejudicial by defendants reveals that none of them were harmful to defendants within the meaning of Fed.R. Civ.P. 61. *See Martin v. Travelers Indemnity Co.*, 450 F.2d 542, 556 (5th Cir. 1971). We therefore conclude the district court did not abuse its discretion in denying defendants' motion for new trial.

AFFIRMED.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
OFFICE OF THE CLERK

June 28, 1982

TO ALL PARTIES LISTED BELOW:

NO. 77-3255 INTERNATIONAL CITY BANK & TRUST CO., ETC., ET AL vs. MORGAN WALTON PROPERTIES, INC., ET AL (District Court No. PCA 74-171)
77-3256 INTERNATIONAL CITY BANK & TRUST CO., ETC., ET AL vs. JOSEPH F. MORGAN, ET AL District Court No. PCA 75-10)

The enclosed order has this day been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure and Circuit Rule 27 for issuance and stay of the mandate.

Very truly yours,

NORMAN E. ZOLLER, Clerk
By: /s/ Kembra L. Smith
Deputy Clerk

CC: Mr. Louis K. Rosenbloum
Mr. Bert Lane

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

No. 77-3255

INTERNATIONAL CITY BANK AND TRUST COMPANY, ETC., ET AL,

Plaintiffs-Appellees,

versus

MORGAN WALTON PROPERTIES, INC., ET AL,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 10, 5 Cir., 1982, ____ F.2d ____).

Before CHARLES CLARK, RONEY and HENDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
/s/ Paul H. Roney
United States Circuit Judge

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* Former Fifth Circuit Case; (section 9(1) of Public Law 96-452-October 14, 1980)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT *

NO. 77-3255
D.C. Docket No. PCA-74-171

INTERNATIONAL CITY BANK & TRUST CO., ETC., ET AL.,
Plaintiffs-Appellees,

versus

MORGAN WALTON PROPERTIES, INC., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Florida

Before CHARLES CLARK, RONEY and HENDERSON, Circuit Judges.

JUDGMENT

Filed September 3, 1982

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

*Former Fifth Circuit case, Sec. 9(1) of Public Law 96-452-Oct. 14, 1980.

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

May 10, 1982
ISSUED AS MANDATE: Sept. 3, 1982

FORMER FIFTH

INTERNATIONAL CITY BANK & TRUST CO. v. MORGAN

INTERNATIONAL CITY BANK & TRUST CO., etc., et al.,
Plaintiffs-Appellees,

v.

Joseph F. MORGAN and Johnnie Mae Morgan, Husband and Wife,
Defendants-Appellants.

No. 77-3256

United States Court of Appeals,
Fifth Circuit.*
May 10, 1982.

Appeal from the United States District Court for the Northern District of Florida; Winston E. Arnow, Judge.

Before CHARLES CLARK, RONEY and HENDERSON, Circuit Judges.

PER CURIAM:

In this diversity mortgage foreclosure action defendants raised four issues on appeal. The instant issues and facts are the same in all significant respects as the issues and facts in *International City Bank & Trust Co., Etc., et al. v. Morgan Walton Properties, Inc., et al.*, Slip op. p. _____, _____ F.2d _____, filed this date, so that our resolution of that case in favor of plaintiffs-appellees controls our decision here. Accordingly, the decision of the district court is AFFIRMED.

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

No. 77-3256

INTERNATIONAL CITY BANK & TRUST COMPANY, ETC., ET AL.,

Plaintiffs-Appellees.

versus

JOSEPH F. MORGAN and
JOHNNIE MAE MORGAN, husband and wife

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Florida
Filed Jun 28, 1982

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion May 10, 5 Cir., 1982, ____ F.2d ____).

Before CHARLES CLARK, RONEY and HENDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local

*Former Fifth Circuit case; (Section 9(1) of Public Law 96-542-October 14, 1980)

Fifth Circuit Rule 16), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT *

No. 77-3256
D.C. Docket No. PCA-75-10

INTERNATIONAL CITY BANK & TRUST CO., ETC., ET AL.,

Plaintiffs-Appellees,

versus

JOSEPH F. MORGAN and JOHNNIE MAE MORGAN, husband and wife,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Florida

Before CHARLES CLARK, RONEY and HENDERSON, Circuit Judges.

JUDGMENT
Filed September 3, 1982

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

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*Former Fifth Circuit case, Sec. 9(1) of Public Law 96-452-Oct. 14, 1980

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

May 10, 1982
ISSUED AS MANDATE September 3, 1982

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

INTERNATIONAL CITY BANK AND
TRUST COMPANY, a Louisiana
banking corporation,
Plaintiff and Third-Party Plaintiff,

vs.

MORGAN-WALTON PROPERTIES, INC.,
et al.,
Defendants,

vs.

JOHN R. SITTON, JR., et al.,
Third-Party Defendants.

No. PCA 74-171

Filed May 10, 1976

ORDER

Before the court are motions of plaintiff and of defendants for summary judgment. Defendants move for summary final judgment in their favor and against plaintiff on the following issues of liability:

1. Whether plaintiff is entitled to relief sought by the complaint in this cause.

2. Whether plaintiff has breached its contract with defendants to lend them the amounts agreed to be loaned

for the loan period agreed and paid for.

3. Whether plaintiff violated the provisions of Title 12, §1972, *U.S.C.*, as alleged, entitling defendants to recover treble damages.

Plaintiff has moved for a summary judgment in the following particulars:

1. A judgment of foreclosure of the mortgage, dated December 29, 1973, recorded in Official Records of Walton County, Florida.

2. Judgment in favor of the plaintiff and against the defendants on the proposition of usury.

3. Judgment in favor of the plaintiff and against the defendants on their affirmative defense and their counterclaim for a violation of Section 1972 of Title 12 of the *U.S. Code.*

4. Judgment in favor of the plaintiff and against the defendants on their affirmative defense and counterclaim of a contractual obligation of the plaintiff to fund development of the tract of land described in the complaint.

Respecting the issue number 1 of each motion, the court had previously ruled the notes here involved to be demand notes. Nevertheless, at request of defendants, the court has considered the additional authority submitted by them. The additional cases cited are each distinguishable from this case in that there are no inconsistent, alternative due dates shown in the notes here involved. The due dates shown in the notes are each two years after the dates of the notes which is entirely consistent with the words, "Demand or

2 years after date," contained in the notes. The court concludes the notes were payable on demand but, if no demand were made, then two years after the dates thereof.

There is here no ambiguity in the notes which would justify consideration of parol evidence to show the intention of the parties to be otherwise than as expressed in the notes. Further, the last sentence of each note expressly states that it evidences the entire agreement between the parties.

It is admitted no demand was made prior to institution of this foreclosure suit. The question is then presented whether formal demand for payment was a necessary prerequisite to institution of the suit. In the last paragraph of each of the notes, it is stated: "The makers of this note . . . hereby severally waive presentment for payment, demand, protest, and notice of protest and non-payment . . ." A provision of waiver of demand or notice embodied in an instrument binds all parties thereto. 10 *C.J.S., Bills and Notes,* §430. Further, as pointed out by plaintiff, the purpose of demand prior to institution of suit is to give the maker of the note opportunity to make payment and thus avoid expenses of litigation. Here, defendants had opportunity to make payment immediately upon institution of the suit. Instead, they have denied plaintiff is entitled to recovery on the notes. Also, failure to make demand does not preclude recovery on the notes; it merely permits the maker to set up certain defenses insofar as costs and damages are concerned. 10 *C.J.S., Bills and Notes,* §345(c).

Issue number 2 of defendants' motion and issue number 4 of plaintiff's motion are related to the above and to each other. Plaintiff claims there was no contractual obligation on its part to fund the entire project. In their latest memo-

randum, defendants state such is not the thrust of their first affirmative defense, breach of contract, and their counterclaim, based, in part, on breach of contract. The apparent thrust of defendants' claim for breach of contract is that, beyond the loans evidenced by the notes and mortgage, there was an overall joint venture between the parties for development of the subject property, which embodied various other agreements between them.

In view of the court's ruling concerning the demand nature of the notes and the right of plaintiff to institute suit without formal demand, there could be no breach of contract by plaintiff to fund the project for a period of exactly two years as alleged by defendants. However, in addition, defendants also allege breach of other agreements connected with the overall venture; e. g., failure to satisfy the existing mortgage of defendants which plaintiff had agreed to do and "freezing" of the bank account and other acts which defendants allege resulted in preventing their being able to perform. Respecting these matters, there exist genuine issues of material fact.

In view of the foregoing, it appears plaintiff's motion should be granted to the extent that it is the ruling of the court that it had the right to institute suit without prior demand and, in all other respects, should be denied as to plaintiff's issues 1 and 4 and defendants' issues 1 and 2.

Plaintiff's issue number 2 asks judgment against defendants on their affirmative defense on the issue of usury. After review of the extensive authorities submitted by all parties, it is the conclusion of the court that the notes here involved should be construed according to the law of Louisiana. In reaching this conclusion, the court is not unmindful of *May v. U.S. Leasing Corp.*, 239 So.2d 73

(Fla. App. 1970). The situation in that case is distinguishable from that in this case. In *May* the entire transaction took place within the State of Florida, and the fact that the lease might have been a contrivance or device to avoid the Florida usury laws was apparent. Here, both the State of Louisiana and the State of Florida have contacts with the transaction, and the matters relied on by defendants as showing bad faith do not indicate any suspicion of such, and, regarding such, present no genuine issue of fact.

In addition, defendants rely on *F.S.* §687.071, the criminal usury statute, which provides in subsection (7), "No extension of credit made in violation of any of the provisions of this section shall be an enforceable debt in the courts of this state." Subsection (2), violation of which is alleged by defendants, provides in pertinent part: "Unless specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take, or receive interest thereon. . ." in excess of certain specified rates shall be guilty of a misdemeanor. It is admitted the loans here involved would be usurious under the law of Florida but not under the law of Louisiana. There are no reported cases dealing with the possible effect of subsection (7) on contracts valid where made but usurious under §687.071. From the authorities, it does not appear that usury has ever been declared to be against the public policy of the State of Florida, even under the prior criminal usury statutes. In view of the case law and without benefit of any construction of subsection (7) by the Florida courts, this court concludes this subsection could not have been intended to have the effect of rendering unenforceable in this state a contract valid and enforceable in the place where made.

It therefore appears motion of plaintiff for summary judgment on its issue number 2, usury, should be granted.

On defendants' and on plaintiff's issue number 3, each moves for summary judgment in its favor on defendants' counterclaims and affirmative defense alleging violation of 12 *U.S.C.* §1972.

At hearing, plaintiff contended that mere filing of a declaration of divestiture had the effect of rendering ICB Corporation no longer a holding company under the applicable statutes and regulations. No authority has been furnished to this effect. The court concludes that, while filing the declaration would enable ICB to commence new activities, it would not cause it to cease to be a bank holding company. The prohibitions of §1972 are, therefore, applicable, it being admitted that otherwise ICB is a bank holding company under the statutory definition as set forth in 12 *U.S.C.* §1843. However, from the record, it appears there exist genuine issues of material fact as to whether the transaction complained of falls within the proscription of the statute.

It is concluded further or other oral argument on the matters dealt with herein would serve no useful purpose.

Accordingly, it is,

ORDERED as follows:

1. Motion of plaintiff for summary judgment on its issues numbers 1 and 4 is hereby granted to the extent it is the ruling of the court that the notes here involved were demand notes, and plaintiff was entitled to institute

suit thereon without prior demand thereon for payment, and with partial summary judgment to that effect being hereby entered in favor of plaintiff and against defendants.

Motion of plaintiff for summary judgment on its issue number 2 is hereby granted, with partial summary judgment being hereby entered in favor of plaintiff and against defendants on the question of usury raised by such motion.

On its issue number 3, and in all other respects to the extent not granted herein, plaintiff's motion for summary judgment is denied.

2. Motion of defendants for summary judgment on their issue number 3 is granted to the extent it is the ruling of the court that ICB Corporation is a bank holding company within the meaning of 12 *U.S.C.* §§1843 and 1972, and with partial summary judgment being hereby entered thereon in favor of defendants and against the plaintiff.

On their issues numbers 1 and 2, and in all other respects to the extent not granted herein, defendants' motion for summary judgment is denied.

DONE AND ORDERED this 10 day of May, 1976.

/s/ Winston E. Arnow
WINSTON E. ARNOW
Chief Judge